DATUK ONG KIAN SENG & ORS.

v.

YEONG KOK CHUN & ORS.

FEDERAL COURT, KUALA LUMPUR
WAN SULEIMAN FJ
MOHD. AZMI FJ
HASHIM YEOP SANI FJ
[CIVIL APPEAL NO. 198 OF 1983]
30 APRIL 1984

CIVIL PROCEDURE: *Order to deposit documents and common seals of companies with Senior Assistant Registrar pending disposal of suit - Whether valid - Whether Court had power - Order 29 r. 2(1) - Whether order contrary to s. 157 Companies Act.*

The appeal was against the order granting the application to deposit with the Senior Assistant Registrar of the High Court all files, minutes and other documents together with the common seals of the 4th and 5th appellant companies until the disposal of the suit with liberty to the parties involved to apply for orders from time to time. The disputes between the appellants and the respondents were regarding firstly the shareholdings and directorships in the 4th and 5th appellant companies and secondly the validity of a written agreement between the intervener (3rd applicant) and the 5th appellant company. An interlocutory order was made on 20 November 1982 in the first suit to restrain the 1st and 2nd appellants from acting as directors of the companies but this order was vacated subsequently by another order of the Court.

Held:

[1] Order 29 rule 2 (1) of the Rules of the High Court 1980, conferred power on the trial Judge to make the order she did and it was not wrong in law for the Judge to have exercised her discretion under the circumstances. For the purpose of preserving the integrity of documents in dispute or relevant in a dispute, r. 2(1) should be construed to include any document the authenticity of which would be a crucial issue in an action. (*Re Saxton, decd.* [1962] 1 WLR 859).

[2] The order was not contrary to s. 157 of the Companies Act 1965. Section 157 does not override or exclude the power of the Court in appropriate cases to make an order to protect the integrity of documents which will be relevant for the proper determination of a dispute. In the circumstances of the case, where there were disputes regarding the shareholdings and the directorships, and the control of the registered office of the companies and a dispute as to who the proper secretary of the companies was, the most appropriate repository for the documents was the Court.

[3] However, the order should be varied to exclude the deposit of the common seals. From the minutes of the trial Judge when the order was granted and the reasoning contained in the judgment, it was clear that it was the documents, which constituted the real subject of the order and not the common seals of the companies.

[Appeal dismissed subject to the above variation in the order of the trial Judge.]

Case referred to:

Re Saxton, decd. [1962] 1 WLR 859

Legislation referred to:
Companies Act 1965, s. 157
Rules of the High Court 1980, O. 29 r. 2(1)

For the appellants - Dominic Puthucheary; M/s. K.Y. Foo & Co.
For the 1st & 2nd respondents - Sri Ram; M/s. Sri Ram, Zulkifly & Kumar
For the 3rd respondent - Raja Aziz Addruse (Philip Choong with him); M/s. Philip Choong & Co.

JUDGMENT

Hashim Yeop Sani FJ:

The appeal is against the order granting the application to deposit with the Senior Assistant Registrar of the High Court all files, minutes and other documents together with the common seals of the fourth and fifth appellant companies until the disposal of the suit with liberty to the parties involved to apply for orders from time to time. When the appeal came up for hearing before this Court Mr. Dominic Puthucheary, Counsel for the appellants elected to proceed only with ground 1 and ground 8 of the memorandum of appeal.

In ground 1 the appellants claimed that the order negates the effect of the order of the High Court which allowed the appellants to carry on as the companies' lawful directors. In ground 8 the appellants claimed that the order of the learned Judge was contrary to s. 157 of the Companies Act, 1965 which imposes a statutory duty on the directors to have in their custody the documents and the common seals of the companies.

A brief summary of the background facts is necessary. The first and second respondents are the son and daughter-in-law respectively of the first appellant. The disputes between them and the others named are firstly on the shareholdings and directorships (of first respondent and of first and second appellants) in the fourth and fifth appellant companies (Civil Suit P839 of 1982) and secondly on the validity of a written agreement between the intervener and the fifth appellant company (Civil Suit F310 of 1982). The fifth appellant company is the concessionarie of forest land in the State of Kelantan of about 40,000 acres and the intervener claims to be the contractor to carry out logging operations over a portion of the land. In Civil Suit P839 of 1982 the first respondent (plaintiff there) claims that at gun-point and under threat of physical harm he was coerced by the first appellant to sign certain documents pertaining to the transfer of his shareholdings and his resignation as director of the companies. It was also alleged that the first appellant unlawfully appointed the third appellant as secretary of the company to replace Messrs. K.C. Yeong & Co. (the applicant who asked for the order to deposit the documents and common seal with the Court on 8 March 1983).

The order to deposit the documents and common seals of the companies with the Court was granted on 27 June 1983. Apparently the order was not extracted and not exhibited. But from the minutes of the learned Judge including that of 27 June 1983 it would appear that the order granting the application carried with it also an expressed condition that both parties be given liberty to inspect and make copies and to apply for orders from time to time.

The grounds given in the application for the order of the custody of the documents and common seals was set out in the affidavit of one Lee Pak Meng dated 8 March 1983. Briefly the affidavit explained that the application was made so that the documents and common seals in the possession of the secretary of the companies appointed before the dispute be deposited with the Court in the interest of justice as well as in the interest of the companies. The intervener who would seem to support the application stated in the affidavit of one

Kho Ah Tee dated 10 May 1983 that the question as to the validity of the agreement between the intervener and the fifth appellant company could only be determined by reference to certain documents in the possession of the same secretary of the companies.

The objection by the appellants to the application and the granting of the order was briefly stated in the affidavit of the first appellant dated 12 April 1983 in that the dispute between the first appellant and the two respondents should be of no concern to the applicant. According to the same affidavit the applicant had chosen to take sides by failing to comply with the request to hand over the seals and the documents belonging to the companies.

It is clear from the judgment (p. 215-222) that the learned Judge was aware there was a dispute between the directors of the companies and that the issue as to who are the lawful directors is yet to be decided, and it was with the view to preserving the integrity of all the documents belonging to the companies that the order was granted.

We will now deal with ground 1 of the memorandum of appeal. The order of the High Court dated 20 November 1982 was an interlocutory order made in Civil Suit No. P839 of 1982 on application of the plaintiffs (respondent now) in that suit to restrain the first and second defendants there (first and second appellants now) from acting as directors of the companies until 3 December 1982. This order was vacated subsequently by another order of the Court. The only question arising now is whether the Court has power on the application of any party to the cause or matter to make orders for the detention and preservation of the documents and common seals of the companies.

Order 29 rule 2(1) of the Rules of the High Court 1980 reads as follows:

> On the application of any party to a cause or matter the Court may make an order for the detention, custody or preservation of any property which is the subject-matter of the cause or matter, or as to which any question may arise therein, or for the inspection of any such property in the possession of a party to the cause of matter.

The corresponding provision in the English Supreme Court Rules is also O. 29 r. 2(1). The Supreme Court Practice 1979 at p. 483 refers to O. 29 r. 2 and 3 as follows:

> Quite apart from these rules the Court has an inherent power to make an order for the detention or preservation of the subject-matter of a cause and of documents relating thereto. This power can be invoked on an *ex parte* application in those rare instances where a plaintiff can show an extremely strong *prima facie* case, that the damage, potential or actual, is very serious for the applicant, that the defendant has in his possession incriminating documents or things and that there is a real possibility that he might destroy such material before an application *inter partes* can be made.
> (Emphasis is supplied).

For the purpose of preserving the integrity of documents in dispute or relevant in a dispute, r. 2(1) should in our view be construed to include any document the authenticity of which would be a crucial issue in an action. In *Re Saxton, decd.* [1962] 1 WLR 859, the Court dealt with the old O. 50 r. 3 where the language is similar to our O. 29 r. 2(1). Wilberforce J at p. 861 construed this rule as follows:

> The rule is not very accurately drafted but it does seem to me that it is sufficiently widely drawn to authorise the Court to make an order for the delivery of any property or thing, including a document, to an expert for inspection in order that that expert may be able to provide full evidence on it. It seems to me that, for that purpose the Court may authorise observation to be made of the document or an experiment to be tried. In my judgment there is power under the rule to make the order of the type here requested.

> However, the question whether such an order should be made in any case is a matter of judicial discretion, and the order may be made on terms necessary to produce a just result.
>
> In this case it is perfectly clear that the authenticity of this document is a crucial issue in the case, at any rate as regards the beneficial ownership of the shares which are referred to in the statement of claim.

In our view O. 29 r. 2(1) of the Rules of the High Court, 1980 confers powers of the Judge to make the order as she did and it was not wrong in law for the Judge to have exercised her discretion under the circumstances.

As regards ground 8 of the memorandum of appeal, it should be noted firstly that s. 157 of the Companies Act 1965 only directs that the books containing the minutes of the proceedings of any general meeting shall be kept by the companies at its registered office or its principal place of business and that such minutes shall be open for inspection to any member without charge. Any member shall be entitled under that section to be furnished within fourteen days on request in writing and on payment of the prescribed charge with the copy of any such minutes. Any company which contravenes this provision commits an offence.

In the present case it is obvious that there is a dispute over the shareholdings and the directorship of the companies. There is a dispute as to the control of the registered office of the companies. There is also the dispute as to who is the proper secretary of the companies. Apart from the first appellant and the first respondent there is only one other member of the companies. Under the circumstances it is obvious that the most appropriate repository for the documents would be the Court. In our view s. 157 of the Companies Act does not override or exclude the power of the Court in appropriate cases to make an order (as done in this case) to protect the integrity of documents which will be relevant for the proper determination of a dispute.

Looking at the minutes of the trial Judge when the order was granted (p. 214) and the reasoning contained in the judgment (p. 218-219) it would seem to us that it was the documents which constituted the real subject of the order and not the common seals of the company. Thus the judgment sets out the reasoning as follows:

> In the meantime, to maintain the *status quo*, the 1st and 2nd defendants have been declared to be persons to be in control and management of the 4th and 5th defendants subject to their submitting statement of accounts to the Court at the end of each month. But the issue as to who are the lawful directors of both companies is still there and will only be decided after the case has been heard and disposed of. It is with a view to preserving the integrity of all documents belonging to the 4th and 5th defendants that the applicants wish to have them deposited for safe keeping with the Senior Assistant Registrar until after the issue over the directorship of both companies has been decided.

Therefore the order of the trial Judge should not have included the depositing of the common seals of the company so as to affect the day-to-day running of the affairs of the company. Subject to this variation in the order of the trial Judge the appeal is dismissed with costs.

Also found at [1984] 1 CLJ 338